

Making rights real

Preventing retaliatory evictions in Wales

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Executive Summary

This report examines the issue of retaliatory eviction – where a private landlord issues possession proceedings against tenants who ask them to address disrepair or other issues – and makes the case for introducing protection in law for tenants in Wales.

Shelter Cymru and Citizens Advice Cymru caseworkers regularly see clients who are unwilling to raise disrepair issues with their landlord in case it jeopardises their tenancy. We also see enough cases of actual retaliatory action to demonstrate that, unfortunately, our clients' fears are well founded.

Statistical data on the extent of the problem nationally is scarce, but there is a wide range of qualitative data demonstrating the nature of its impacts.

As part of the research for this report we undertook a survey of Environmental Health and Tenancy Support Officers. We had responses from 29 officers in 20 authorities. Every respondent said they had encountered tenants who were unwilling to enforce their rights to repair due to fears of eviction. The majority of respondents (85 per cent) were in favour of legislation to prevent a landlord serving eviction proceedings if the tenant had taken steps to exercise a statutory right.

The need for protection

This problem should be considered in the context of a growing reliance on the private rented sector (PRS). Reduced access to mortgages, shortages in social housing, and the impacts of the economic downturn and welfare reform have all in recent years contributed to growth in the sector. The number of houses in the PRS has more than doubled in ten years¹, and is widely expected to continue to grow while other sectors stagnate or shrink.

Retaliatory eviction laws overseas

We undertook a detailed review of retaliatory eviction statutes from other countries. Wales is not alone in the world for having a PRS characterised by flexibility, short-term tenancies and 'no-fault' evictions. However, many other countries with similar PRS markets have got protection from retaliatory eviction in law. For example, 39 of the 50 US states have some form of retaliatory eviction statute. Tenants are also protected from retaliatory eviction in New South Wales, Queensland, South Australia, Victoria, Western Australia, Tasmania and New Zealand.

It is essential to consider the needs of people living in the PRS who might in the past have been better able to access social housing. There is a rapidly growing need for the Welsh Government to regulate in order to protect those tenants who are most vulnerable and most in need of stability. Protection from retaliatory eviction also represents a positive move that the Welsh Government could take to assist those hit by welfare reform.

¹ From 88,539 in 2001/02 to 190,534 in 2011/12 (Source: StatsWales)

Opportunities in Wales

There are a number of measures currently proposed by the Welsh Government that aim to enhance and professionalise the sector:

- The Renting Homes Bill, proposed to be introduced to the Assembly in 2015, will sweep away the many current forms of tenure in Wales and replace them with two new forms of tenancy – a standard contract, similar in scope to the current assured shorthold tenancy, and a secure contract, modelled on the current secure contract in local authority-owned social housing.
- The Housing Bill, which is due to be introduced later in 2013, includes a wide range of measures including legislation to create compulsory registration and accreditation for private landlords.

The introduction of standard tenancy contracts under the Renting Homes Bill represents a unique opportunity to put protection from retaliatory eviction into law. This would have a positive effect on compliance with standard contract obligations, both among landlords and tenants.

We have concerns that the proposal to remove the ‘six-month moratorium’ may make households feel more vulnerable to retaliatory eviction and therefore less likely to challenge their landlord on disrepair. This may be a particular problem for tenants on low incomes who are not in strong bargaining positions with landlords.

Introducing protection from retaliatory eviction would give tenants who are on periodic contracts more confidence to raise issues with their landlord, whether on disrepair or failure to become registered and accredited.

Benefits for Wales

We have identified a number of benefits that protecting tenants from retaliatory eviction could bring to society and the economy:

- **Tenants and local authorities would be able to work together more effectively to target the worst landlords.** Local authorities would receive more intelligence about where problems are occurring, while tenants would be confident that they can get serious disrepair addressed without risking homelessness.
- **There would be greater incentive for landlords to ensure there are no Category 1 hazards in their stock.** Introducing this protection in law would incentivise investment across the sector but particularly at the worst end, where problems are the greatest.
- **Tenant and landlord compliance with tenancy obligations would be improved.** Landlords would have greater incentive to meet their repairing obligations, while tenants would have greater incentive to ensure they honour their obligations, in the knowledge that failure to do so may exempt them from protection from retaliatory acts. This would enhance the effectiveness of the whole Renting Homes scheme.
- **Landlord licensing would spread across Wales more quickly.** Tenants would be more empowered to ask why their landlord is not yet on the register.

- **Protection would help improve standards for tenants hit by welfare reform.** PRS tenants in receipt of Local Housing Allowance have had their income severely slashed. The CPI uprating rule² ensures this will continue into the future. Protection from retaliatory eviction would be a positive move that the Welsh Government could take to improve living conditions for people hit by cuts.
- **Better standards could lead to cost savings for services such as the NHS and homelessness.** Poor quality housing is expensive for the NHS. Loss of PRS tenancy is one of the biggest contributors to official homelessness statistics.

Recommendations

We have a single overarching recommendation:

The Welsh Government should include protection from retaliatory eviction in the standard tenancy contracts to be introduced under the Renting Homes Bill.

Within this recommendation, there are a number of key issues that we believe need careful consideration:

- **Tenants need to be able to directly challenge a retaliatory action.** Virtually all the other statutes we studied as part of this report include protection as a defence to a possession action.
- **It is possible to introduce protection in a way that balances the interests of tenants and landlords, and does not penalise good landlords.** On the one hand, landlords must be protected from vexatious claims by tenants. On the other hand, tenants need to be confident that any defence used by the landlord is genuine. There are numerous international examples of statutes that have sought to achieve this balance.
- **Any new legislation needs to have clarity and simplicity at its heart.** Some landlords find it very difficult to understand their rights and responsibilities under existing law. The new, simplified framework envisaged under the Renting Homes proposals is an ideal vehicle for framing any new protection in a straightforward way.
- **A transition managed over a period of time may be more realistic.** It is a legal requirement that tenants should not have to live with the risk of serious hazards in the home, and it is landlords' statutory obligation to address those hazards. Nevertheless, in reality the transition to protecting tenants from retaliatory action may need to be managed in a way that gives landlords time to raise investment and minimises the likelihood of extreme rent rises.
- **Enforcement needs to 'stick' no matter who is occupying accommodation.** We sometimes come across repeat cases of retaliatory eviction where landlords evict tenants again and again instead of addressing the disrepair problem. The Welsh Government could give consideration to how the landlord register can help ensure enforcement 'sticks' after a tenant leaves.

² Since April 2013 Local Housing Allowance is now uprated by the Consumer Price Index rather than actual rent rises

- **Rogue landlords will still be a problem.** There is a risk that introducing protection from retaliatory eviction may encourage rogue landlords to resort to illegal eviction methods such as harassment or withdrawal of services. This is why it is critical that local authorities have the resources to carry out enforcement.
- **The Renting Homes Bill should take account of tenants' existing rights to deduct from rent to reimburse the cost of repairs.** In practice this course of action is rarely used by tenants in Wales. Introducing protection from retaliatory eviction would go some way towards helping tenants exercise this right. However, in the long run we believe a more effective solution would be to allow tenants to lodge rent with a neutral third party, as is the case in many US and Australian states.
- **Tenant and landlord education is crucial.** We strongly welcome the emphasis on empowerment through knowledge in both the Renting Homes and landlord licensing schemes. All the people we spoke to in our research felt that education is critical for preventing bad situations arising in the first place.
- **More evidence is needed on how retaliatory eviction laws work in practice.** We are currently undertaking further research to understand more about how effectively laws work overseas.

We welcome further discussion on the issues raised in this report. If you would like to talk about how this could work in Wales, please get in touch with:

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1. Introduction

The private rented sector (PRS) has some of the worst conditions of all Wales' housing stock. Nearly 40 per cent of all privately rented housing has at least one serious health and safety hazard.¹ Despite the fact that the law is supposed to protect tenants from living in conditions like these, in reality many hazards and disrepair issues go unchallenged. One of the main reasons for this is that many tenants decide not to ask their landlord to carry out repairs, as they fear being evicted as a result.

The prevalence of such evictions in our casework demonstrates that, unfortunately, tenants' fears are well founded. Throughout this chapter we have included case studies from Shelter Cymru and Citizens Advice Bureau casework, all of which were brought to us in 2012 and 2013.

So-called 'retaliatory eviction' – where a landlord issues possession proceedings against tenants who ask them to address disrepair or other issues – has not yet been quantified in Wales, and yet its negative impacts can be seen both in terms of evictions themselves and the fear of eviction.

Last year, advisers from Shelter Cymru and Citizens Advice Cymru saw 1,175 PRS-related disrepair problems,² including damp, trip hazards, water leaks, and unsafe gas and electricity systems. We have to advise our clients that if they choose to challenge their landlord to address disrepair, either through the local authority or through a civil claim, they may be making themselves vulnerable to eviction. There is nothing in the law to protect tenants from this.

Having evicted complaining tenants, an unscrupulous landlord is free to re-let to new tenants who may not notice the disrepair until it's too late, or who may feel they have no choice but to put up with whatever property they can find, no matter what state it's in.

How current eviction powers allow retaliatory eviction

Section 21 of the Housing Act 1988 enables a landlord to legally end an assured shorthold tenancy agreement by serving a Notice Requiring Possession upon the tenant, giving the tenant a minimum of two months' notice. The Notice applies to a statutory periodic tenancy – that is, a tenancy that automatically continues after the expiry of a fixed term assured shorthold tenancy. As long as the notice is issued correctly there is no defence for the tenant against the repossession of their home. As landlords are not required to give reasons, they may legally use this procedure as a retaliation tactic if a tenant tries to get repairs or safety issues addressed.

Source: Crew, D. (2007) *The Tenant's Dilemma*. Citizens Advice Bureau

¹ Living in Wales Property Survey 2008. "Serious hazards" refers to Category 1 hazards under the Housing Health and Safety Rating System (HHSRS)

² Figures relate to 2012/13. Comprising 495 cases from Citizens Advice Cymru and 680 from Shelter Cymru

Case study

A couple with four children were renting a property in south-east Wales that was in an extremely poor state of disrepair, including a leak in the roof and gas and electricity hazards. One family member was electrocuted due to dangerous electrical wiring. The landlord did not act on any of the family's requests to address the disrepair issues.

After a gas leak the tenants called out a gas engineer who shut down the faulty appliance. In response the landlord said that since it was the tenants who had called the engineer out, it should be the tenants who pay for the work to be done.

The family contacted Environmental Health, and an assessment of the property was carried out which detailed a large number of health and safety hazards, including Category 1 cold hazards, makeshift and potentially dangerous electrical wiring, insanitary kitchen units that were not capable of being cleaned, and rot in the floor of the first floor bathroom which meant that the bath sagged by up to an inch when used.

One month after Environmental Health wrote to the landlord to ask him to address the problems, the family was served with notice to quit.

They have now managed to find somewhere else to live in the PRS.

The extent of evidence

There is a lack of statistical data on the extent of retaliatory eviction impacts. Partly this can be traced to a general lack of detailed statistical data on the PRS in Wales.³ There are also particular difficulties associated with assessing landlord intention, as well as difficulties measuring the extent of tenant inaction through fear of repercussions.

However, there is a considerable body of qualitative evidence, besides our casework evidence, to demonstrate the nature of the problem. In the report 'Their House, Your Home'⁴ Consumer Focus Wales spoke to tenants who said they feared complaining about the landlord or 'kicking up a fuss', in case it led to retaliatory eviction:

"I like to stay under the radar." (Tenant, young professionals and young families, Swansea).

"Complaining about a landlord can do more harm than good in the long run...there could be repercussions." (Tenant, low income earners, Aberystwyth).⁵

³ In comparison with England, where the annual English Housing Survey provides more detail on the PRS experience

⁴ Their House, Your Home: The Private Rented Sector in Wales (2012) Consumer Focus Wales. Available online at <http://www.consumerfocus.org.uk/wales/files/2012/08/Their-house-your-home-final-eng.pdf>

⁵ *ibid* p39

Recent research into homelessness among people from black and minority ethnic populations,⁶ carried out by Shelter Cymru and Tai Pawb, also found evidence that tenants in the PRS lacked confidence to enforce their rights:

“The landlords have a lot of power, they are nice people but you don’t want to rock the boat as you may find yourself being kicked out.” (Service user, Swansea).

These findings are borne out by our survey of Environmental Health Officers and Tenancy Support Officers in Welsh local authorities (chapter 3). Every respondent who completed our survey said they had encountered tenants who were unwilling to enforce their rights to repair due to fears of eviction.

Case study

A client in south-east Wales contacted our adviser about damp problems in his rented house. The damp was affecting his health and he wanted to know what his options were for dealing with it. He wanted to stay in the property as he was a carer for his father and the location was ideal.

In the end our client did not pursue the disrepair with Environmental Health or as a civil claim as he was fearful of eviction. He preferred to put up with the conditions in the property and the risk to his own health, rather than run the risk of having to move to a different area away from his father.

At UK level, the National Private Tenants Organisation carried out a review of evidence on retaliatory eviction in 2011.⁷ The report assimilated a large amount of qualitative and local-level evidence from public bodies and non-governmental bodies, as well as a limited amount of England-only survey data.

In particular, the report found evidence from numerous local authorities that retaliatory eviction was a common experience. However, a lack of national statistics on the problem was noted.

The report concluded that ‘there is clear evidence of retaliatory eviction, the threat of eviction and fear of eviction’, but ‘the lack of national and local data on landlord management practice and actual retaliatory (legal) eviction hampers an accurate assessment of the extent of the problem. Further research is needed.’⁸

The Rugg review⁹ of PRS housing discussed retaliatory eviction and recommended against direct protection for tenants due to a lack of evidence about ‘actual rather than assumed behaviour’ that leads to the end of tenancies. Julie Rugg cast doubt on tenants’ motives, stating that ‘there are tenants who will claim unfair eviction in the hope that this will improve their chance of getting a social housing tenancy’, which is itself an assumed behaviour.

⁶ Campbell, J. Homelessness amongst Black and Minority Ethnic People in Wales (in publication) Shelter Cymru and Tai Pawb

⁷ Allen, K. (October 2011) Submission on retaliatory eviction to the DECC Green Deal Consent Barriers and Retaliatory Eviction Working Group. National Private Tenants Organisation. Available online at <http://btckstorage.blob.core.windows.net/site5929/V1.3%20DECC%20Retaliatory%20Eviction%20Working%20Group%20Submission.pdf>

⁸ *ibid* p32

⁹ Rugg, J. and Rhodes, D. (2008) The Private Rented Sector: its contribution and potential. Centre for Housing Policy, University of York

Rugg noted the report published by Citizens Advice on retaliatory evictions in England in 2007,¹⁰ which indicated ‘that measures are in place in other countries to deal with the incidence of eviction where a tenant has complained’. The Citizens Advice report signposted to numerous resources that described in detail how statutes work in other countries¹¹. Rugg did not follow up the signposted resources but instead stated that ‘no detail is given on how these policies work in practice, or the outcomes’.

We have addressed this criticism by carrying out a detailed review, described in chapter 2 of this report, of existing retaliatory eviction statutes. In doing so we aim to add to the debate on retaliatory eviction and provide further evidence that introducing such protection in law is a practical possibility.

The Citizens Advice report also included a survey of local authority officers working with the PRS. When reporting the survey results Rugg stated:

‘The officers were asked ‘Are tenants put off using help because of fears of jeopardising their tenancy?’ Of the 129 TROs who responded, 54 per cent said ‘sometimes’.’¹²

What Rugg neglected to report was that a further 46 per cent said ‘often’ and two per cent said ‘always’. In fact, 100 per cent of officers had answered that tenants were put off using help. Rugg also failed to report on the qualitative evidence, which was based on Citizens Advice casework experience.

Rugg levelled the criticism that advice organisations like Citizens Advice and Shelter Cymru may actually be to blame for increasing the fear of retaliatory eviction, since we warn our clients about it. Our response is that this lays the blame at entirely the wrong door, since we are not responsible for the legal loophole that allows retaliatory evictions to take place.

We see enough cases of retaliatory acts to understand that we owe our clients a responsibility to give them a fair warning of a very real threat. It would be irresponsible and negligent of us to withhold this knowledge from our clients. Local authorities often warn tenants in the same way.¹³ In any case, many clients do not seek help from us until they have already received a retaliatory notice.

Finally, Rugg recommended that ‘a more effective approach might be to create a framework where it is more likely that this kind of landlord can be removed from the sector altogether’. Several policy measures currently in development by the Welsh Government, particularly landlord licensing, aim to move the sector in that direction (see chapter 4 for more detail).

¹⁰ Crew, D. (2007) The Tenant's Dilemma. Citizens Advice Bureau

¹¹ For example, on provision in US states see Survey of State Laws Regarding Retaliatory Provisions (2004) Alliance for Healthy Homes. Available at www.afhh.org/res/res_pubs/disclosure_Retaliatory_Laws.pdf. For provision in Australian states see www.austlii.edu.au

¹² Rugg, J. and Rhodes, D. (2008) The Private Rented Sector: its contribution and potential. Centre for Housing Policy, University of York. p80

¹³ Chartered Institute of Environmental Health (CIEH) Evidence on retaliatory eviction submitted to the DECC Green Deal Consent Barriers and Retaliatory Evictions Working Group, September 2011

However, without direct protection tenants will still be vulnerable to retaliatory acts. Rogue landlords may eventually be banned from operating as landlords, but not until they will already have carried out numerous harmful acts to the detriment of their tenants. We argue that the best way to assure protection for tenants is by introducing a direct defence in law.

In summary, there are undoubtedly evidence gaps that hamper our understanding of the exact prevalence of impacts of retaliatory eviction in Wales. However, this should not be a barrier to action. There is sufficient evidence to know that impacts do exist and the nature of such actions. As such, we should not hold back from giving tenants protection.

The cost of poor housing

Unaddressed disrepair carries a cost to government and wider society. In 2011, research carried out jointly by the BRE Trust and Shelter Cymru found that serious (otherwise known as Category 1) health and safety hazards lead to ill health and accidents in the home that cost the NHS in Wales around £67 million a year in treatment costs alone.¹⁴ The total cost to society of dealing with Category 1 hazards across all sectors of Welsh housing, including long-term impacts on health, education and employment, was estimated at around £168 million a year. These figures do not include the costs of dealing with the consequences of less serious hazards and other disrepair issues.

The report also found that many hazards could be addressed at a relatively modest cost: around 20 per cent of homes with serious hazards could be made acceptable for a cost of less than £520 and half for less than about £1,600.

A change in the law to protect private tenants who want to get repairs carried out on their home could create financial savings for government. By encouraging investment in repairs and maintenance, addressing the problem of retaliatory eviction is likely to contribute to improving the quality of housing across the PRS but particularly in the worst end of the sector. This would create more security for tenants, leading in turn to cost savings for the NHS as well as savings elsewhere such as homelessness.

It needs to be clearly stated that a retaliatory eviction law would require landlords to invest in improving their properties only to the level needed to bring them up to existing statutory standards. In this way, the required investment should not be seen as an unreasonable additional burden on landlords.

Case study

Caseworkers in south-east Wales were approached by an individual living in a rented property with a significant level of disrepair including damp, water backflow from the drains, broken heating and broken steps leading to the property. Our client had asked her landlord to carry out repairs but no adequate works were undertaken. She then had a fall as a result of the broken steps, resulting in a fractured hip. Shortly after this the landlord served notice.

We have advised our client on how to make a compensation claim. At the time of going to print she had not been evicted from the property, as she was intending to remain until the landlord obtained a possession order. However, since the possession notice was correctly served there is no defence to the proceedings.

¹⁴ Davidson, M., Nicol, S., Roys, M. and Beaumont, A. (2011) The Cost of Poor Housing in Wales. BRE Trust and Shelter Cymru

Impacts on low income households

In an ideal world tenants would be able to exercise their consumer choice and avoid properties in poor states of repair. Unfortunately, in reality tenants rarely have a great deal of choice. This is a serious problem for those on lower incomes, who are often forced to accept poor quality accommodation due to lack of other options.

This situation is worsening due to recent changes in Local Housing Allowance (LHA): our casework includes many examples of private tenants having to put up with substandard and often dangerous accommodation because, in the aftermath of LHA cuts, they simply cannot afford to live anywhere else.

Furthermore, the under-occupancy penalty, or 'bedroom tax' is widely expected¹⁵ to push households from the social sector into the PRS due to the undersupply of one- and two-bedroom social sector properties. This will serve to increase competition for housing at LHA rent levels.

People hit by welfare reform have the greatest need for protection from retaliatory eviction. While the Welsh Government may be limited in what it can do to relieve people in Wales from the impacts of welfare reform, protection from retaliatory eviction represents a positive step that could improve conditions for those hit the hardest by benefit changes.

Case study

A family in south Wales noticed a problem with damp in their privately rented home. They raised it with the letting agent but the problem remained unaddressed, so they then turned to the local authority Environmental Health department. Following an inspection of the property, Environmental Health served the landlord with notice to address the damp. Shortly after this the landlord initiated possession proceedings.

What can be done in Wales?

Many other countries in the world have protection from retaliatory eviction enshrined in law. In chapter 2 of this report we look in detail at how these provisions work.

However, protection from retaliatory eviction will not solve the whole problem of disrepair in the Welsh PRS. Our casework shows many examples of landlords who simply refuse point-blank to invest in repairs, despite official proceedings. In some cases tenants are living in such poor conditions that they feel they have no choice but to abandon the property.

¹⁵ For example, see <http://www.housing.org.uk/media/press-releases/bedroom-tax-some-home-truths>

Case study

A single mother with a baby was living in private rented accommodation in south-east Wales, let through a lettings agent. She complained to the agent about numerous safety issues in the house, including no flooring in the utility room, and electrical wiring that was unsafe and had blown several appliances. The agent took no action so she took her complaint to Environmental Health who inspected the property and ordered improvements to be made. The letting agent then threatened her with eviction for complaining. No action was taken to address the issues raised by Environmental Health. The situation was extremely stressful for her and she decided to move out for the safety of her baby.

Evidence from our casework demonstrates that just because tenants have rights in existing legislation, it does not follow that landlords will always abide by those rights. Any effort to regulate the PRS runs the risk of pushing rogue landlords further underground. Legislation and enforcement need careful planning. Local authority resources are critically important to carry out enforcement and bring prosecutions as necessary. This is why we see protection from retaliatory eviction as one element of a strategic approach to improving standards, and a measure that could enhance the success of initiatives currently being planned by the Welsh Government.

The Welsh Government has acknowledged the problems caused by retaliatory eviction and the fear of such action. The Homes for Wales White Paper, published in May 2012, outlined the Welsh Government's plans to encourage greater use of the PRS including 'action to improve conditions and practices' which would help 'to reduce the stigma attached to renting as opposed to home ownership'.¹⁶

*'(The private rented sector) is a sector of extremes, from very good quality and conditions at one end, to very poor at the other. Some have well documented tenancy agreements, a good tenant-landlord relationship, and arrangements to maintain and repair their properties to keep them in a decent condition... At the other end of the spectrum the picture is far from being good. Some people have to endure poor conditions, insecurity and, sometimes, threats of eviction. The latter, combined with the lack of other options, means that many people, often vulnerable people, put up with the questionable practices of some landlords and lettings and management agents.'*¹⁷

¹⁶ Homes for Wales: A White Paper for Better Lives and Communities (2012) Welsh Government. par4.14

¹⁷ *ibid.* pars 6.12-13

The White Paper outlined two pieces of legislation which have the broad aim of improving conditions in housing:

- The Renting Homes Bill, proposed to be introduced to the Assembly in 2015, will sweep away the many current forms of tenure in Wales and replace them with two new forms of tenancy – a standard contract, similar in scope to the current assured shorthold tenancy, and a secure contract, modelled on the current secure contract in local authority-owned social housing.
- The Housing Bill, which is due to be introduced later in 2013, includes a wide range of measures including legislation to create compulsory registration and accreditation for private landlords.

The introduction of standard tenancy contracts under the Renting Homes Bill represents a unique opportunity to put protection from retaliatory eviction into law. In chapter 2 we explore evidence from other countries around the world on how this might be done most effectively.

Chapter 3 includes the results of a survey of PRS professionals in Welsh local authorities and a series of interviews with professional landlords on their views and experiences regarding retaliatory eviction.

In chapter 4 we look at how retaliatory eviction might fit within current and emerging policies in Wales.

Chapter 5 comprises our conclusions and policy recommendations, including a discussion of key issues to consider in the development of any new law.

2. Lessons from abroad

A review of international approaches to retaliatory eviction carried out by Citizens Advice in 2007¹⁸ found that many legislatures with private rented sectors similar to the UK's have protection from retaliatory eviction built into statute.

In countries with strong tenants' rights frameworks – including much of mainland Europe, in particular Germany, France, Spain and Italy – the question of retaliatory eviction is not relevant, since landlords cannot summarily evict tenants unless for specific reasons.

However, in countries where tenants have less security such as Australia, New Zealand and the United States, many legislatures have protection in place. In the US, for example, 39 of the 50 states have some form of retaliatory eviction statute.

Furthermore, Citizens Advice identified that tenants have protection in law from retaliatory eviction in New South Wales, Queensland, South Australia, Victoria, Western Australia, Tasmania and New Zealand.

How protection works

There is a common structure to the vast majority of retaliatory eviction laws. Typically, a tenant has a defence of retaliatory eviction if a landlord issues possession proceedings within a certain time frame (ranging from three months to one year; most commonly six months) of the tenant taking certain actions, such as:

- Making a complaint to a government body in relation to a violation of statutory housing standards
- Participating in a tenants' organisation
- Action to enforce any rights under the terms of the tenancy agreement.

The onus is on the tenant to demonstrate that the relevant action was taken prior to the landlord issuing proceedings.

In other words, if the tenant can prove that possession action was issued less than, say, six months²⁰ after they had challenged their landlord on a disrepair or other issue, they will be protected from eviction, unless the landlord can prove otherwise (see 'Providing proof' below).

As well as prohibiting eviction, many legislatures also prohibit a range of other retaliatory acts such as substantially altering the terms of a tenancy in retaliation, increasing the rent or reducing services.

Some legislatures require that the tenant has firstly raised the disrepair issue with the landlord in a reasonable way before escalating it to the public authority. For example, in New Jersey the tenant must have 'brought a good faith complaint to the attention of the landlord and... given him a reasonable time to correct the alleged violation' before taking a complaint to a governmental authority.²¹

Examples of typical statutes are included in the Appendix.

¹⁸ Crew, D. (2007) The Tenant's Dilemma. Citizens Advice Bureau

¹⁹ Survey of State Laws Regarding Retaliatory Provisions (2004) Alliance for Healthy Homes. Available at www.afhh.org/res/res_pubs/disclosure_Retaliatory_Laws.pdf

²⁰ Minnesota has a unique approach to the time limit: if the eviction proceedings occur within 90 days of the tenant filing the complaint, the burden lies with the landlord to prove there was no retaliatory intent. If however the proceedings occur more than 90 days after the complaint being filed, the burden of proof lies with the tenant.

²¹ New Jersey Statutes Annotated Title 2A:42:10:12 (West1975)

Providing proof

There is a recognised problem²² in how to provide satisfactory evidence of the landlord's motives. To address this, the common solution has been to create a presumption of retaliation: that is, if the tenant can prove that the possession action came within a specified time of the disrepair issue being formally raised, the court will presume that the eviction is retaliatory.

However, in order to balance the interests of tenants and landlords this presumption can be rebutted by the landlord in a wide variety of ways.

In New York, for example, section 223-B of the Real Property Law established a presumption of retaliatory eviction if the tenant can show that the landlord served notice within six months of certain protected acts such as making a complaint to a governmental authority. The presumption, however, is relatively easy to rebut, and any 'credible explanation' from the landlord will be accepted by the court. This is held to be an equitable solution that balances the interests of landlords and tenants,²³ although some could argue that it favours the landlord more than the tenant.

New York is one of a number of legislatures that opted to keep the statutory provisions around landlords' defences relatively general, leaving them open to interpretation by the courts. In Florida²⁴ the landlord can rebut the presumption by proving that the possession action is 'for good cause'.

Similarly, the Massachusetts General Laws²⁵ state that landlords can rebut retaliatory claims 'only by clear and convincing evidence' that the possession action was not retaliatory and would have taken place anyway regardless of the tenant's actions.

In Queensland, Australia, the question of landlord motive is for the Residential Tenancies Authority tribunal to establish, which can then overturn a notice to quit.²⁶ The situation is similar in New Zealand, where a tribunal has to satisfy itself 'that the landlord was so motivated in giving the notice' unless that tribunal finds that the tenant's complaint was 'vexatious or frivolous to such an extent that the landlord was justified in giving the notice'.²⁷

Other legislatures have chosen to state specifically the defences that are available to landlords facing retaliatory claims.

²² For example see Lowe, D., Retaliatory Eviction Protection in New York - Unravelling Section 223-b, 48 Fordham L. Rev. 861 (1980) p870. Available at <http://ir.lawnet.fordham.edu/flr/vol48/iss5/9>

²³ *ibid* p.873

²⁴ Florida Statutes Chapter 83.64 (2003)

²⁵ Massachusetts General Laws Chapter 186 Section 18 (Supp.1975)

²⁶ Residential Tenancies and Rooming Accommodation Act 2008 s.291-292

²⁷ Residential Tenancies Act 1986 2.54

In Delaware, Title 25 of the Delaware Code²⁸ includes a list of 12 defences that a landlord can bring against a retaliatory claim, among which are:

- The landlord wishes to recover possession for use as the landlord's own residence
- The landlord wishes to remove the property from the rental market
- The landlord wishes to substantially alter, remodel or demolish the premises
- The complaint relates to conditions in the property that were caused by the tenant
- The landlord has contracted to sell the property
- The condition complained of is impossible to remedy within the specified timescale.

The majority of US states with retaliatory eviction statutes have fewer than 12 stated defences for landlords. However, the general pattern of specifying defences is repeated throughout the statute books.

Besides the defences listed above, other common provisions include:

- The tenant has existing rent arrears or is in breach of any other rental obligation (Washington)²⁹
- The tenant is committing waste, or a nuisance, or is using the dwelling unit for an illegal purpose or for other than living or dwelling purposes in violation of the tenant's rental agreement (Hawaii)³⁰
- Compliance with the applicable building or housing code requires alteration, remodelling, or demolition which would effectively deprive the tenant of use of the dwelling (Kentucky)³¹
- The increase in rent applies in a uniform manner to all tenants (Nevada)³²
- The complaint by the tenant was made to the landlord or an agent of the landlord in an unreasonable manner or at an unreasonable time or was repeated in a manner having the effect of unreasonably harassing the landlord (Oregon).³³

Having defences like these in law means that it is up to the court to decide whether it was reasonable for the landlord to pursue possession. If a tenant has acted reasonably, is not in breach of any tenancy terms, and not in rent arrears, and if the landlord appears to have no other valid reason to end the tenancy, then the court may decide that the eviction action was retaliatory and therefore invalid.

²⁸ Delaware Code Annotated Title 25 Section 5516 (1975)

²⁹ Revised Code of Washington s.59.81.240 (1983)

³⁰ Hawaii Revised Statutes Chapter 521.74 (1975)

³¹ Kentucky Revised Statutes s.383.705-74 (1996 through Reg Sess)

³² Nevada Revised Statutes 118A.510 (1999)

³³ Oregon Revised Statutes Chapter 90.385 (1999)

Penalties

Numerous statutes describe the penalties available to tenants if they have been subject to retaliatory eviction:

- In Texas, if a landlord retaliates against a tenant, the tenant may recover a civil penalty of one month's rent plus \$500, actual damages, court costs, and reasonable attorney's fees, minus any delinquent³⁴
- In Delaware tenants may recover three months' rent or treble the damages sustained by the tenant, whichever is greater, together with the cost of the suit but excluding attorneys' fees³⁵
- In New York landlords may be subject to civil action for damages and other relief 'as may be determined by a court of competent jurisdiction'.³⁶

Rent withholding / 'repair and deduct'

Protection from retaliatory eviction strengthens tenants' abilities to use their rent money to get work carried out. This is permitted in 42 US states³⁷ and there is also a rarely-used procedure in UK law.³⁸

There are two basic possibilities for tenants to use rent to get work carried out:

- *Rent withholding* – whereby tenants hold back some or all of the rent to encourage the landlord to carry out repairs. Many tenants resort to this tactic in the UK, although it is not provided for in law and leaves the household vulnerable to eviction.

In the US, states that permit rent withholding often require individuals to pay the rent money into the court, a neutral third party or escrow account until the dispute is resolved. Landlords may request money to be released for repairs. In some US states it is possible to defend a possession claim for non-payment of rent by claiming the accommodation is unfit.

Lodging rent with a tribunal until disputes are resolved is also permitted in New South Wales, South Australia and Victoria.

- *'Repair and deduct'* – whereby tenants carry out the work themselves and deduct the cost from the rent. There is a procedure established in UK case law³⁹ that allows tenants to do this, although it is rarely used due to its complexity, the risk of retaliatory action, and the necessity of having funds available to carry out work.

'Repair and deduct' is permitted in more than half of US states and some major cities. State laws specify the details such as the maximum amount of rent you can use for repairs (for example, one month's rent) and the frequency with which you can use the remedy (for example, once in an 18-month period).

³⁴ Texas Property Code s.92.333 (1995)

³⁵ Delaware Code Annotated Title 25 Section 5516 (1975)

³⁶ New York Real Property Law s. 223-B (Consol.1979)

³⁷ For more information see www.nolo.com

³⁸ <http://www.sheltercymru.org.uk/get-advice/get-advice-online/repairs-and-bad-conditions/repairs-in-private-tenancies/tenants-doing-repairs>

³⁹ Lee-Parker v Izzet (1971)

Procedure for deducting from rent to pay for repairs – UK

Step 1: Report the repairs to the landlord in writing and allow time for them to be done. Keep a copy.

Step 2: Write to your landlord again, explaining that you intend do the work yourself and take the costs out of your rent unless the repairs are done within a certain time (e.g. two weeks). Keep a copy.

Step 3: Once this time has passed, get three quotes/estimates for the work from reliable contractors

Step 4: Send the quotes to your landlord with a letter explaining that you are going to go ahead with the cheapest quote unless your landlord arranges for the repairs to be done within a certain time (e.g. a further two weeks).

Step 5: Once this time has passed, if your landlord hasn't responded, arrange for the work to be done by the contractor that gave the cheapest quote

Step 6: Pay for the work yourself and send a copy of the receipt to your landlord, asking them to refund the money.

Step 7: If your landlord does not give you back the money, write and confirm that you are going to deduct the money from your future rent. Explain exactly when the deductions will start and how long you will withhold rent for.

Source: Shelter Cymru Advice Online <http://www.sheltercymru.org.uk/get-advice/get-advice-online/repairs-and-bad-conditions/repairs-in-private-tenancies/tenants-doing-repairs>. Advice pages include sample letters

In practical terms, using the rent to get works carried out is risky in countries such as Wales where there is no protection from retaliatory eviction. Introducing such protection would help support tenants to exercise their existing repair and deduct rights.

Since the Renting Homes Bill aims to bring together existing tenancy law in a clear, understandable way, it would be appropriate to include the right to deduct from rent in the Bill in a simpler, more straightforward form.

However, we acknowledge the shortcomings of the existing right, and would argue that a structured method for withholding rent by paying it to a neutral third party would be a preferable method of resolving disputes.

Summary

Retaliatory eviction statutes are only necessary in countries where the private rented market allows landlords to evict tenants on a 'no-fault' basis in a straightforward way. In markets like these, tenants are vulnerable to eviction against their will at relatively short notice, even when they have not breached any terms of their agreement. This is the case in Wales, although unlike many other similar countries, we have no retaliatory eviction protection in statute.

There is a common pattern to the way that most retaliatory eviction laws work. If a tenant has formally complained about a disrepair issue they can challenge any possession notice issued by the landlord within a specified time period. Provided the complaint was made 'in good faith', before the possession notice was issued, a court will overturn the notice unless the landlord can prove the action was taken for a good reason.

In this way, the courts decide whether the landlord had a valid reason for the possession action. This protection gives tenants confidence that they can get disrepair issues addressed without running the risk of making themselves homeless. At the same time, landlords are protected from 'vexatious' objections, so that tenants are unable to contrive a retaliatory claim. If tenants have not lived up to their tenancy obligations, typically they are not protected from retaliatory eviction.

There is, therefore, an established legal form that the Welsh Government could use to inform the development of a new law for Wales.

Many US and Australian states give tenants the right to use rent to get works carried out, either by withholding money in a structured way or deducting the cost of repairs from rent payments. While there is a procedure for this in the UK it is rarely used due to its complexity, fears of retaliatory action, and the necessity of having funds available to carry out works. Introducing protection from retaliatory eviction would help support tenants to exercise this right, although in the long term we would argue that a preferable solution would be to allow tenants to pay rent to a neutral third party until disputes are resolved.

In the next chapter we examine the views of PRS professionals within local authorities, and private landlords themselves, before going on to look at policy options and conclusions.

3. The views of private rented sector professionals

To gain a greater understanding of the extent of support for a retaliatory eviction law we canvassed the views of a range of professionals working in and with the PRS. Firstly we carried out a survey with local authority Environmental Health Officers and Tenancy Support Officers, who work closely with private tenants and landlords on resolving disrepair and other issues. Secondly, we sought to interview a number of professional private landlords.

Results: local authority survey

We contacted all 22 local authorities and asked officers working in Environmental Health and PRS Tenancy Support to complete a short online survey. Responses were received from 29 respondents in 20 authorities.⁴⁰

When asked if tenants had been put off from using help offered by Environmental Health or Tenancy Support because of fears of jeopardising their tenancy, 100 per cent of respondents answered positively, indicating that they had dealt with clients who were put off accessing help. The majority of respondents (62 per cent) stated that tenants were sometimes put off, while a further 38 per cent answered that tenants were 'often' put off.

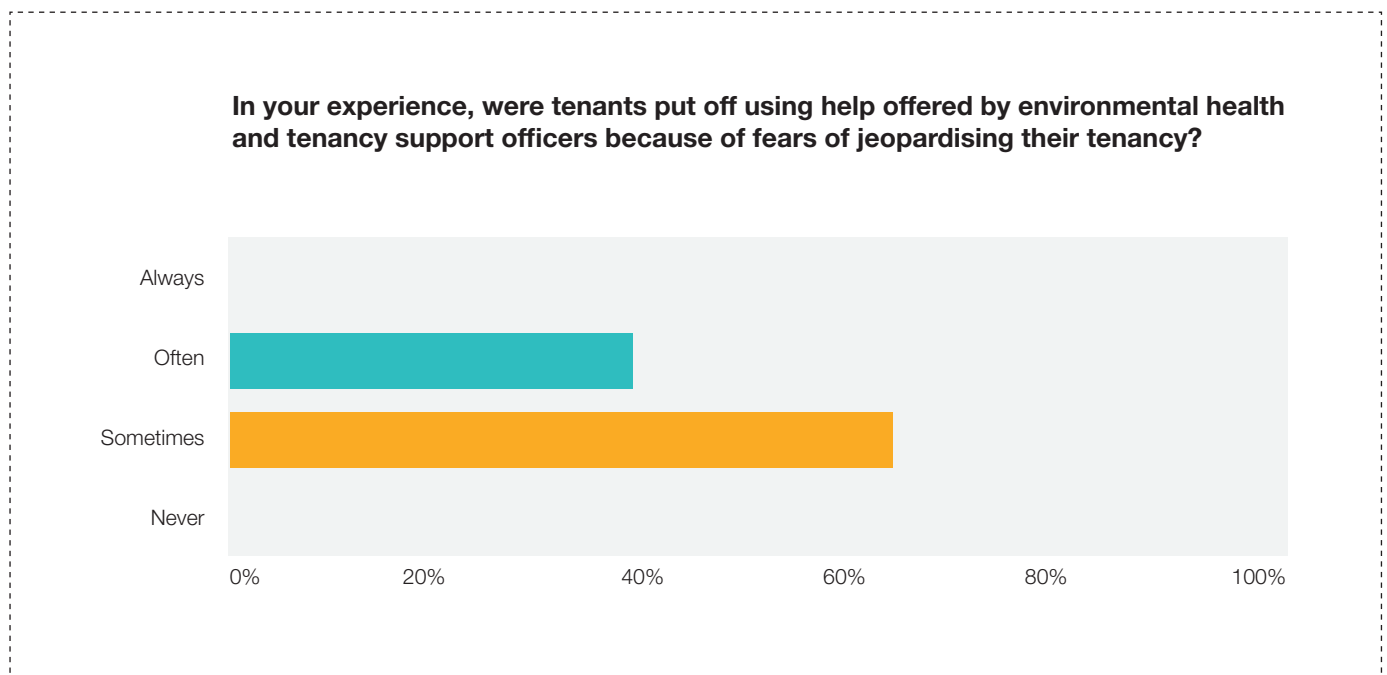


Figure 1: Percentage of respondents indicating whether in their experience tenants are put off using help offered by the local authority because of fears of jeopardising their tenancy.

⁴⁰ Blaenau Gwent, Bridgend, Caerphilly, Cardiff, Carmarthenshire, Ceredigion, Conwy, Denbighshire, Flintshire, Gwynedd, Merthyr Tydfil, Monmouthshire, Neath Port Talbot, Newport, Pembrokeshire, Powys, Rhondda Cynon Taf, Vale of Glamorgan, Wrexham

Most respondents agreed that there was definitely concern from tenants about making formal complaints.

“Tenants may complain about aspects of their property but when they realise that the Environmental Health Officer has to inform the landlord they often retract their complaint.” (Local authority survey respondent)

“Tenants want an ‘unofficial’ inspection of the property, which we’re not allowed to do due to the requirements of the Housing Act.” (Local authority survey respondent)

“Recent monitoring of this area has identified tenants’ concern to be a big issue.” (Local authority survey respondent)

Respondents also pointed to the fact that many tenants may not contact them at all due to concerns about retaliation.

“We are unable to gauge how many do not contact us at all. We have numerous clients who contact us for advice and do not make a further complaint – this may be because they then realise the implications. Some clients specifically say they do not want our involvement due to the fear of retaliation.” (Local authority survey respondent)

Respondents were asked whether they believed there needed to be more security for tenants when exercising their statutory rights.

Over half (55 per cent) thought that there was a definite need for more tenant security, with a further 38 per cent believing that it was a possible solution. Only two respondents thought more security was unnecessary.

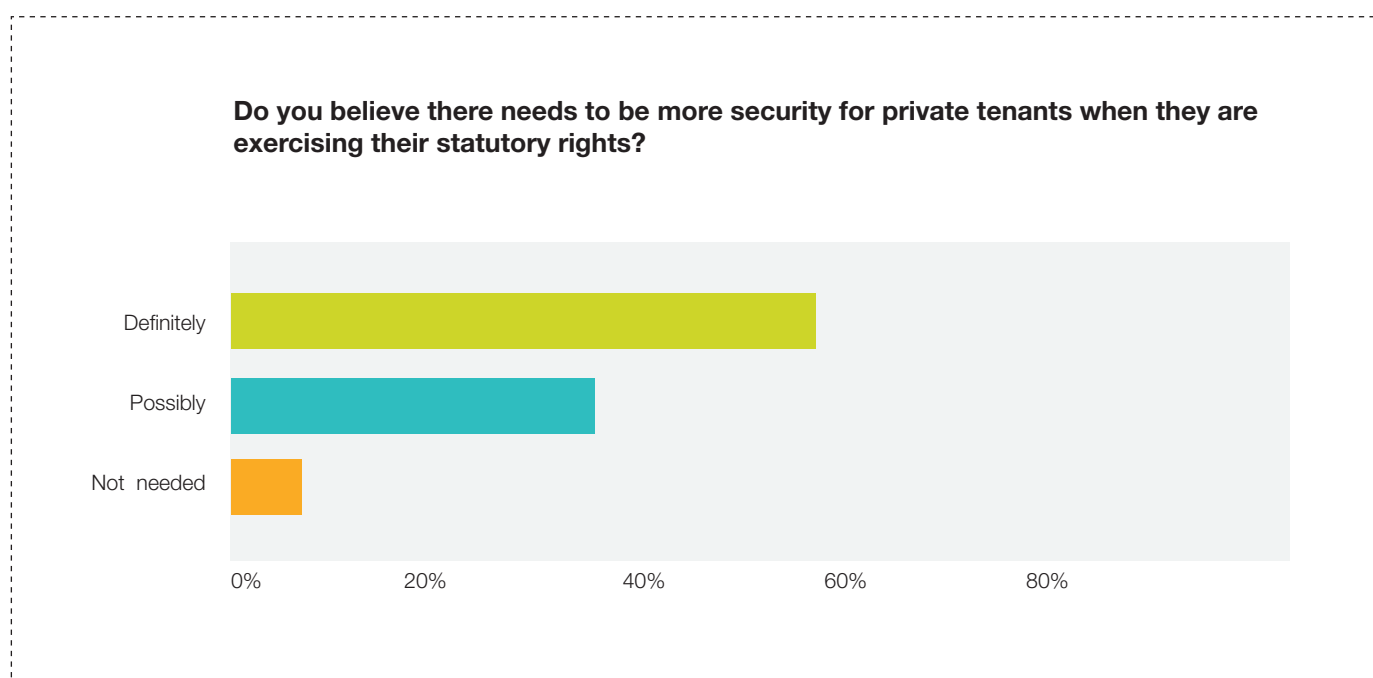


Figure 2: Percentage of respondents indicating whether they believe there needs to be more security for private tenants when they are exercising their statutory rights.

There were a number of suggestions for effective ways to do this:

“Needs a moratorium on serving notice under these circumstances whilst HHSRS⁴¹ investigations [are] pending.”

“In retaliatory evictions there should be somewhere safe to stay for the tenant which the homelessness team should be able to provide.”

“This could be easily achieved by the elimination of the section 21 notice and an increased effectiveness of the section 8 route.”

“There needs to be clearer defined law for both parties, tenants and landlords, and as part of the Environmental Health degree this legislation should be taught.”

Respondents were asked what they thought of the idea of legislation to preclude a landlord from serving a Section 21 notice if the tenant has taken steps to exercise a statutory right. The majority of respondents (85 per cent) were in favour of legislation, with 72 per cent stating that it was a ‘good idea but with provisos’. Fourteen per cent thought it would be an ideal situation, and 10 per cent did not know. Only one respondent thought legislation was unnecessary.

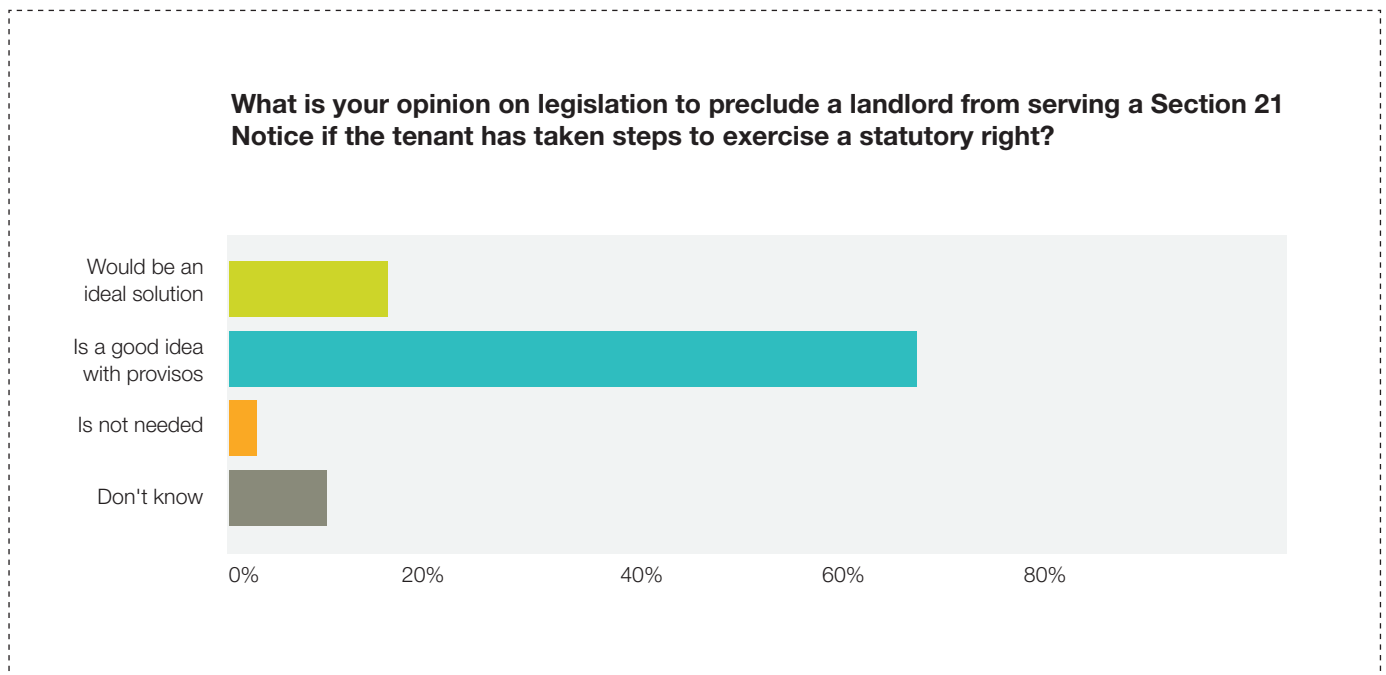


Figure 3: Percentage of respondents indicating their opinion on legislation to preclude a landlord from serving a Section 21 notice if the tenant has taken steps to exercise a statutory right.

⁴¹ Housing Health and Safety Rating System

Respondents highlighted the need to ensure that any legislation balanced the legitimate interests of tenants and landlords.

“Provisions must be made for genuine landlords that want to evict their tenants and any new legislation must be flexible to allow for this. It is vital that any change in policy/ legislation around retaliatory evictions must be fair and equitable for all.” (Local authority survey respondent).

“Provision should be in place i.e. if rent arrears etc or if landlord has already started the process. Maybe something on lines of not allowed to evict until work is done, or a set time period between Environmental Health involvement.” (Local authority survey respondent).

“As long as conditions are in place such as proof that the tenant has made reasonable attempts in contacting the landlord regarding the works required etc.” (Local authority survey respondent).

Finally, respondents were asked whether they would support a campaign to protect tenants from retaliatory eviction. More than a third (41 per cent) answered they would, with a further 52 per cent stating they may support a campaign. Two respondents did not want to support the campaign.

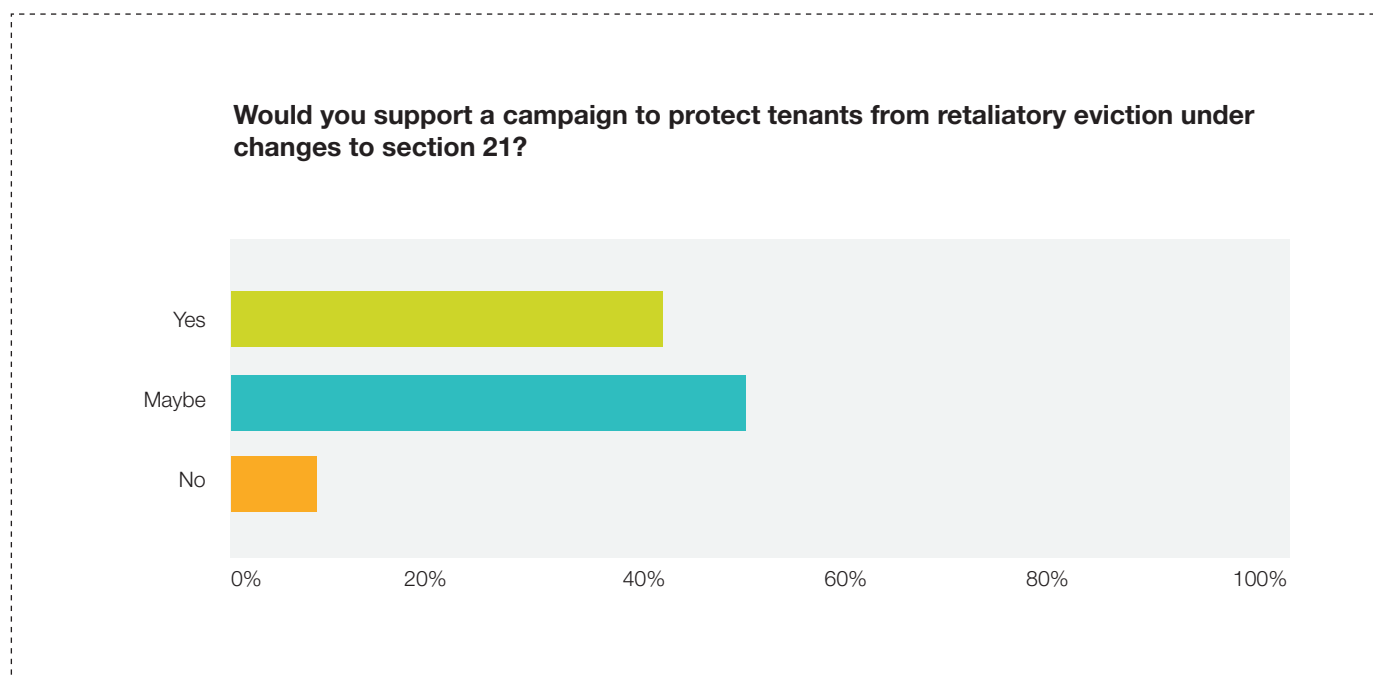


Figure 4: Percentage of respondents indicating whether they would support a campaign to protect tenants from retaliatory eviction.

Again, respondents' comments highlighted the need for a balanced approach.

“As long as it didn't preclude landlords from evicting tenants who are in rent arrears or who are deliberately preventing them from doing repairs.” (Local authority survey respondent).

“We must support tenants through difficult situations like this, however, we must not be entirely focused on just tenants' rights, we must also support landlords/agents so that they invest in the sector and help us as a council to deliver our services, particularly around homelessness.” (Local authority survey respondent).

Results: The views of landlords

There are obvious complications involved in canvassing the views of private landlords on this issue. Responsible landlords see the sense in keeping their properties in a good state of repair in order to comply with the law and protect their investment. Regulation aimed at the rogue end of the sector may be viewed as a burden on responsible landlords, who may not be aware of the extent of the bad practice that we see in our casework.

Nevertheless, we spoke to two professional landlords to gather their views on the need for a retaliatory eviction law. Both stated that they had no direct experience of retaliatory eviction, but acknowledged that it did occur in Wales. One felt that there was often an underlying reason behind many retaliatory eviction cases that ran deeper than a landlord simply not wanting to repair something and then evicting the tenant. It was also felt that there are many 'accidental' landlords out there who may carry out retaliatory acts out of naivety and a lack of education on landlord obligations.⁴²

One landlord was broadly in favour of protection, stating that they had no problem with a law coming in to protect 'good tenants'. However, there would need to be strong provisos to protect landlords from 'rogue' tenants who would want to use the law as a reason to not get evicted, even if they were in rent arrears. The landlord noted that bringing in new laws can be problematic for landlords. Some landlords already find the law very complicated, and new legislation might deter landlords from renting.

The second landlord we interviewed was in favour of improving standards but was opposed to giving more protection in law. Rather than amending eviction rights to include protection from retaliatory eviction, this landlord felt that the focus should instead be on creating an environment where it does not happen. The feeling was that conflicts arise due to lack of education on the part of landlord and tenant, which could be solved by mutual education on obligations and rights.

It was felt that current enforcement tends to target the good landlords that do minor things wrong and avoids targeting rogue landlords. There are currently reasonable ways in which repairing obligations can be met without changing the law. All that is needed is more enforcement and consistency across Wales. Appropriate enforcement of the current law would target bad landlords without tarnishing good landlords and retaliatory eviction would then be less likely to take place.

Both landlords had concerns about changing section 21 to include protection from retaliatory eviction. Both felt that the current law is so complicated that section 21 is one of the only things that landlords have to make them feel secure, and that adding complexity may discourage landlords from remaining in the sector.

The issue of landlord and tenant education was raised by both interviewees. Mutual education on obligations and rights was seen as critical to preventing the situations that may give rise to retaliatory acts.

⁴² This 'naivety' was thought to be exacerbated by the complexity of the current law

Summary

There was some evidence of disparity between the views of local authority officers and landlords on the issue of retaliatory eviction. While none of the people we spoke to denied that retaliatory evictions took place, opinion differed on the need for legislative change.

All of the local authority officers we spoke to had dealt with tenants who had been put off from accessing help offered by the local authority because of fears of retaliatory action. For more than a third of officers, fear of retaliatory eviction was a phenomenon they came across often.

The vast majority of local authority officers were in favour of a legislative change. More than half of survey respondents thought there definitely needed to be more security for tenants exercising their statutory rights, and a further 39 per cent thought it was a possible option, with a number of different suggestions for how this could be done in practice.

The two professional landlords we spoke to also felt there was a need to address poor practice among rogue landlords, but that this should not be done by making any changes to powers of eviction. One felt that if enforcement were more appropriately targeted at bad landlords there would be fewer retaliatory evictions anyway. There were also concerns about making the system any more complex than it already is, as some landlords already struggle with the complexity of the current legal framework.

Both landlords emphasised the importance of tenant and landlord education to prevent situations developing that may lead to retaliatory acts.

Finally, many of the people we spoke to among local authority officers and landlords felt that any new law to protect tenants from retaliatory eviction would need to include provisos to protect landlords from 'rogue' tenants who may try to take advantage of their new rights.

4. A viable solution for Wales? How retaliatory eviction fits into current and emerging policy

In this chapter we examine current policy developments and opportunities for creating greater protection for tenants. We look at how protection from retaliatory eviction might sit within emerging policy developments and what effect it might have on their success.

Explicit protection from retaliatory eviction should form one element of a wide-ranging strategy to develop the PRS as a viable housing option, ensuring that the legislation and resources are in place to effectively target rogue landlords and support good ones.

There are a number of measures currently proposed by the Welsh Government that aim to enhance and professionalise the sector, including new rental contracts based on principles of clear language and fairness, and compulsory registration and accreditation of private landlords.

Tenants' repairing rights in the Renting Homes Bill

The proposals in the Renting Homes Bill are based on the work carried out by the Law Commission which culminated in the publication of their report, *Renting Homes*, in 2006.⁴³ The scheme developed by the Law Commission aimed to bring a consumer approach, based on clarity and fairness, to the current tenancy system. The Welsh Government is proposing to introduce the Renting Homes Bill to the Assembly during 2015.

The new 'standard' and 'secure' rental contracts envisaged under the Bill⁴⁴ bring together landlords' existing repairing obligations with the requirement under the Housing Act 2004 to ensure there are no Category 1 hazards on the premises (known as the HHSRS).⁴⁵ The contract will therefore include a complete statement of landlords' duties to carry out repair and maintenance. As a fundamental provision of all the proposed contracts, these would be enforceable in the county court as a breach of contract.

In our view it is a great advantage for the Bill to bring the repairing obligations and the HHSRS into one landlord covenant which the contract-holder can enforce under the Act. It cures the problem that tenants have always had of not being able to take county court proceedings for failure to meet fitness/HHSRS standards, and of not being able to get Legal Aid to do this in another tribunal.

In this way tenants will have a parallel remedy to local authority action, being able to drive their own case to get hazards removed rather than depending solely on Environmental Health. The availability of Legal Aid will open up the possibility of redress to more households. We look forward to seeing what difference this makes to tenant empowerment.

However, the fact remains that the level of security of tenure in the standard contract is no greater than is currently available to tenants. The contract is largely modelled on the existing Assured Shorthold Tenancy agreement, and as such includes a 'no-fault' eviction procedure available to landlords.⁴⁶ This means that, in practice, tenants will have no greater protection from retaliatory acts than they have at present.

⁴³ *Renting Homes: The Final Report: vol 1 Report* (2006) Law Com 297

⁴⁴ *Renting Homes: The Final Report: vol 2 Draft Bill* (2006) Law Com 297

⁴⁵ Housing Health and Safety Rating System

⁴⁶ Under section 173 of the Draft Bill

Furthermore, the Welsh Government is proposing to remove the 'six-month moratorium' that currently protects tenants from eviction for the first six months of their tenancy. Potentially this could have the unintended effect of increasing tenants' vulnerability to retaliatory eviction and further deterring them from defending their rights.

Currently, if tenants need to raise disrepair issues it is generally in their interests to do so when they have a substantial length of time left on their fixed term agreement. By being protected from immediate eviction they hope that any bad feeling between themselves and the landlord will have settled by the time they come to renegotiate the tenancy.

The 'six month moratorium' gives tenants some assurance that if they raise disrepair issues near the start of the tenancy, they will be protected both from eviction and rent rises for at least a few months. Our concern about the Renting Homes proposals is that there appears to be little incentive for landlords to offer any fixed term at all. Instead the scheme allows them to insist that new tenants remain on rolling periodic contracts until they decide the tenants can be trusted or, potentially, for the duration of the tenancy.

This may not be a problem for tenants with a certain level of income who are able to exercise consumer choice and negotiate favourable terms with potential landlords. However, households on low incomes are generally not in a strong bargaining position and will have little choice but to accept whatever terms their landlord proposes. These are also the households who are most at risk of living in poor quality accommodation and being subject to retaliatory acts.

If, when the Bill becomes law, periodic contracts become more prevalent among low-income households starting new PRS tenancies then many will be in even more precarious positions than they are now. In these circumstances it will be highly unlikely that tenants will be willing to challenge their landlord on any issue, let alone one that could see them branded a 'troublemaker' and evicted with two months' notice at any time.

Introducing retaliatory eviction protection would greatly assist tenants to negotiate with their landlord in order to ensure that the repairing and other obligations in the standard rental contract are met.

As well as improving landlord compliance it could also have a positive effect on tenant compliance, since tenants would be aware that if they failed to honour their tenancy obligations they would no longer be protected from retaliatory acts. This could serve to enhance the overall effectiveness of the Renting Homes scheme.

Compulsory landlord licensing

As well as the Renting Homes Bill, the Welsh Government also proposes to introduce compulsory registration and accreditation for all private landlords under the Housing Bill.⁴⁷ Under these proposals every landlord in Wales will be required to register their details with a central database and pass a 'fit and proper person' test. Landlords must then become fully accredited within two years, by taking an introductory course and then undertaking Continuing Professional Development training.

This move has the potential to improve standards of professionalism across the PRS. Our casework reveals frequent examples of landlords who lack a basic understanding of their legal obligations. Provided it is backed by the resources to deliver it effectively, licensing will help ensure that all landlords are equipped with the essential knowledge needed to rent homes responsibly.

It will also assist local authority officers to target enforcement at the worst landlords: for the first time, Environmental Health Officers will have a comprehensive list of all the PRS properties in their area and will therefore be able to identify rogue landlords more easily.

In our casework we sometimes come across repeat cases of retaliatory action: a tenant will approach us after receiving an eviction notice in retaliation for contacting the local authority; then some months down the line another tenant will approach us with the same disrepair issues in the same property. In our experience, unless enforcement is in the form of formal notices it does not always 'stick' after a tenant leaves.

Ensuring that there are resources in place to follow up disrepair issues will reduce the incentive for landlords to evict, since removing the tenants will not remove the problem. The landlord register should assist Environmental Health Officers to identify outstanding enforcement actions, provided it allows information on informal action and warnings as well as formal notices to be logged.

We hope that, over time, registration and accreditation will mean that retaliatory eviction becomes less frequent in Wales. Without legislation, however, it will remain a disincentive for tenants to stand up for themselves.

Furthermore, we feel that the take-up of licensing across Wales could be made quicker if tenants were more empowered to raise issues with their landlord, such as whether they were intending to become registered, without fear of reprisals. Landlords who are hostile to the concept of registration may decide to get rid of their 'troublesome' tenant rather than carry out the request.

Tenants could play a strong role in encouraging the spread of licensing in Wales, but the extent to which they can do this depends on how empowered they feel to raise issues with their landlord, particularly issues where landlords may have a strong antipathy.

⁴⁷ Due to be laid before the Welsh Assembly during Autumn 2013

Summary

The Renting Homes Bill and landlord licensing both have the potential to create positive change in the PRS. We believe the success of both initiatives could be enhanced by the introduction of protection from retaliatory eviction.

The Renting Homes Bill represents a key opportunity to enshrine this protection in law. This would have a positive effect on compliance with standard contract obligations, both among landlords and tenants. Landlords would have greater incentive to meet their repairing obligations, while tenants would have greater incentive to ensure they honour their obligations, in the knowledge that failure to do so may exempt them from protection from retaliatory acts.

We have concerns that the proposal to remove the 'six-month moratorium' may make households feel more vulnerable to retaliatory eviction and therefore less likely to challenge their landlord on disrepair. This may be a particular problem for tenants on low incomes who are not in strong bargaining positions with landlords.

Introducing protection from retaliatory eviction would help tenants who are on periodic contracts to have more confidence to raise issues with their landlord, whether on disrepair or failure to become registered and accredited.

5. Conclusions and recommendations

This report presents evidence that retaliatory eviction is a problem in the private rented sector (PRS) in Wales, both in terms of actual evictions and the fear of eviction that prevents many tenants exercising their rights. Every local authority officer who took part in our survey said that they had encountered tenants who had rejected assistance from them due to fear of reprisals, and the vast majority of officers were in favour of increasing protection in law.

The need to address this problem should be considered in the context of a growing reliance on the PRS. Reduced access to mortgages, shortages in social housing, and the impacts of the economic downturn and welfare reform have all in recent years contributed to growth in the sector. The number of houses in the PRS has more than doubled in ten years,⁴⁸ and is widely expected to continue to grow while other sectors stagnate or shrink.

As noted in the Welsh Government's Homes for Wales White Paper,⁴⁹ it is critical to ensure that the PRS becomes a tenure of choice, where people are happy to make a home long-term, rather than feeling that they are stuck there due to lack of other options.

It is essential to consider the needs of people living in the PRS who might in the past have been better able to access social housing. With the prospect of the Housing Bill giving local authorities the power to discharge the main homelessness duty with a PRS tenancy, there is a growing need for the Welsh Government to regulate in order to protect those tenants who are most vulnerable and most in need of stability.

Wales is not alone in the world for having a private rented sector characterised by flexibility, short-term tenancies and 'no-fault' evictions. However, many other countries with similar PRS markets have got protection from retaliatory eviction in law. For example, 39 of the 50 US states have some form of retaliatory eviction statute. Tenants are also protected from retaliatory eviction in New South Wales, Queensland, South Australia, Victoria, Western Australia, Tasmania and New Zealand. This means that there are tried-and-tested statutes in existence from which Wales can learn.

⁴⁸ From 88,539 in 2001/02 to 190,534 in 2011/12 (Source: StatsWales)

⁴⁹ Homes for Wales: A White Paper for Better Lives and Communities (2012) Welsh Government. par 4.14

Key benefits for Wales

Giving tenants protection from retaliatory eviction could bring a number of benefits to society and the economy:

- **Tenants and local authorities would be able to work together more effectively to target the worst landlords.** Local authorities would receive more intelligence about where problems are occurring, while tenants would be confident that they can get serious disrepair addressed without risking homelessness.
- **There would be greater incentive for landlords to ensure there are no Category 1 hazards in their stock.** Introducing this protection in law would incentivise investment across the sector but particularly at the worst end, where problems are the greatest.
- **Tenant and landlord compliance with tenancy obligations would be improved.** Landlords would have greater incentive to meet their repairing obligations, while tenants would have greater incentive to ensure they honour their obligations in the knowledge that failure to do so may exempt them from protection from retaliatory acts. This would enhance the effectiveness of the whole Renting Homes scheme.
- **Landlord licensing would spread across Wales more quickly.** Tenants would be more empowered to ask why their landlord is not yet on the register.
- **Protection would help improve standards for tenants hit by welfare reform.** PRS tenants in receipt of Local Housing Allowance have had their income severely slashed. The CPI uprating rule* ensures this will continue into the future. Protection from retaliatory eviction would be a positive move that the Welsh Government could take to improve living conditions for people hit by cuts.
- **Better standards could lead to cost savings for services such as the NHS and homelessness.** Poor quality housing is expensive for the NHS. Loss of PRS tenancy is one of the biggest contributors to official homelessness statistics.

* Since April 2013 Local Housing Allowance is now uprated by the Consumer Price Index rather than actual rent rises

Recommendations

We have a single overarching recommendation:

The Welsh Government should include protection from retaliatory eviction in the standard tenancy contracts to be introduced under the Renting Homes Bill.

Within this recommendation, there are a number of key issues that we believe need careful consideration:

- **Tenants need to be able to directly challenge a retaliatory action.** Virtually all the other statutes we studied as part of this report include protection as a defence to a possession action. The landlords we spoke to were opposed to introducing such protections, while a majority of local authority officers were in favour.

Creating an environment where retaliatory evictions do not happen is a laudable aim but in practice we doubt rogue landlords can be pushed out of the sector before they have committed numerous harmful acts to the detriment of their tenants. Introducing restrictions on eviction proceedings may be controversial but it has already been done in relation to protection of tenancy deposits. We believe it is the most effective way to give tenants direct protection when they need it.

- **It is possible to introduce protection in a way that balances the interests of tenants and landlords, and does not penalise good landlords.** The landlords we spoke to, and the local authority officers who responded to our survey, all pointed to the importance of balancing the interests of tenants and landlords.

On the one hand, landlords must be protected from vexatious claims by tenants. For example, if tenants have breached tenancy conditions or if tenants have caused the disrepair themselves, then landlords should be protected from retaliatory claims. This is already the case in all the statutes we examined.

On the other hand, tenants need to be confident that any defence used by the landlord is a genuine one. For example, if a landlord defends a retaliatory claim by stating that they intend to sell the property and subsequently fails to put it on the market, there must be a clear and straightforward procedure for the tenant to claim damages and recover costs. This will be critical to ensure the legislation works as it is intended.

Since it may be difficult for tenants to ascertain the actions of a former landlord it may be necessary to require landlords to provide evidence that they have indeed taken the relevant actions.

- **Any new legislation needs to have clarity and simplicity at its heart.** Some landlords find it very difficult to understand their rights and responsibilities under existing law. We have anticipated the argument that introducing a new protection for tenants may be a complicating factor at a time when we are revising tenure law in favour of simplicity, and may therefore be going against the grain of current policy developments.

In our view this is, in fact, an ideal time to empower tenants in this way. The new, simplified framework will be capable of bearing the additional detail. While the Renting Homes proposals will make tenancy law – including possession procedures – considerably more straightforward, any new clauses to ban retaliatory acts can be constructed in a similarly straightforward way.

The whole ethos of protection from retaliatory eviction is about incentivising landlord and tenant compliance with tenancy conditions. Introducing protection in law has the potential to improve the effectiveness of the whole Bill as it applies to the PRS.

The examples of statutes included in the Appendix reveal a variety of approaches, ranging from general provisions which leave key questions to the discretion of the courts, to highly detailed and specific clauses stating every defence available to landlords. We consider that the latter approach,⁵⁰ which at first glance appears more protracted, actually brings greater clarity since landlords are able to work out for themselves how a retaliatory claim can be rebutted, without having to consult a lawyer.

- **A transition managed over a period of time may be more realistic to give landlords time to raise investment and protect tenants from extreme rent rises.** Category 1 hazards carry a cost to the NHS and wider society. It is a legal requirement that tenants should not have to live with that level of risk. Investment to deal with the worst hazards should not be viewed as burdensome on landlords – it is their statutory obligation, and the majority of good landlords already invest to ensure their stock is free from serious hazards and dangerous disrepair.

In reality, however, the transition to protecting tenants from retaliatory action may need to be managed in a way that gives landlords time to raise investment, minimises the risk of landlords leaving the sector and minimises the likelihood of extreme rent rises to finance improvements. The Welsh Government may wish to consider making low-cost loans available in a similar way to the Houses to Homes⁵¹ scheme.

- **Enforcement needs to ‘stick’ no matter who is occupying accommodation.** As stated in chapter 4, we sometimes come across repeat cases of retaliatory eviction where landlords evict tenants again and again instead of addressing the disrepair problem. Unless enforcement is in the form of formal notices it does not always ‘stick’ after a tenant leaves.

The Welsh Government could give consideration to what level of detail about enforcement action can realistically be logged on the landlord register. If a tenant leaves before the ‘ladder of enforcement’ reaches the stage of formal action, it’s possible that disrepair issues might go unaddressed until the next tenants have the same problems.

- **Rogue landlords will still be a problem.** Just because tenants have rights in legislation, it does not follow that landlords will always abide by those rights. There is a risk that introducing protection from retaliatory eviction may encourage rogue landlords to resort to illegal eviction methods such as harassment or withdrawal of services.

This is why it is critical that local authorities have the resources to give advice, carry out inspections, take formal action and bring prosecutions as necessary. Most tenants do not have the time, capacity or resources to enforce their rights alone; Legal Aid is now restricted for standalone claims to those posing a serious health hazard and where the value of repairs is above £1,000; and, in the case of rogue landlords, tenants may still not complain if they fear reprisals in the form of harassment. Local authority funding for Environmental Health enforcement activity is crucial.

⁵⁰ Exemplified by many US states including, but not limited to, Alaska, Connecticut, Delaware, Hawaii, Iowa, Kansas, Kentucky, Montana, Nevada, North Carolina, Ohio, Oregon, Rhode Island, Tennessee, Texas, Virginia and Washington.

⁵¹ <http://wales.gov.uk/topics/housingandcommunity/housing/private/emptyhomes/housestohomes/?lang=eng>

- **The Renting Homes Bill should take account of tenants' existing rights to deduct from rent to reimburse the cost of repairs.** In practice this course of action is rarely used by tenants in Wales due to fears of retaliatory action, among other barriers. We would welcome action to strengthen and simplify existing law. Introducing protection from retaliatory eviction would go some way towards achieving this, as would including the right in tenancy contracts. However, in the long run we believe a more effective solution would be to allow tenants to lodge rent with a neutral third party, as is the case in many US and Australian states.

Tenant and landlord education is crucial. We strongly welcome the emphasis on empowerment through knowledge in both the Renting Homes and landlord licensing schemes. All the people we spoke to in our research felt that education is critical for preventing bad situations arising in the first place. Any new law on retaliatory eviction can be communicated through the accreditation scheme and the tenancy contract itself.

- **More evidence is needed on how retaliatory eviction laws work in practice.** We are currently undertaking further research to understand more about how effectively laws work overseas.

We welcome further discussion on the issues raised in this report. If you would like to talk about how this could work in Wales, please get in touch with:

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Appendix: Examples of retaliatory eviction statutes

North Carolina

Defense of retaliatory eviction, N.C. GEN. STAT § 42-37.1 (1979)

(a) It is the public policy of the State of North Carolina to protect tenants and other persons whose residence in the household is explicitly or implicitly known to the landlord, who seek to exercise their rights to decent, safe, and sanitary housing. Therefore, the following activities of such persons are protected by law:

- (1) A good faith complaint or request for repairs to the landlord, his employee, or his agent about conditions or defects in the premises that the landlord is obligated to repair under G.S. 42-42;
- (2) A good faith complaint to a government agency about a landlord's alleged violation of any health or safety law, or any regulation, code, ordinance, or State or federal law that regulates premises used for dwelling purposes;
- (3) A government authority's issuance of a formal complaint to a landlord concerning premises rented by a tenant;
- (4) A good faith attempt to exercise, secure or enforce any rights existing under a valid lease or rental agreement or under State or federal law; or
- (5) A good faith attempt to organize, join, or become otherwise involved with, any organization promoting or enforcing tenants' rights.

(b) In an action for summary ejectment pursuant to G.S. 42-26, a tenant may raise the affirmative defense of retaliatory eviction and may present evidence that the landlord's action is substantially in response to the occurrence within 12 months of the filing of such action of one or more of the protected acts described in subsection (a) of this section.

(c) Notwithstanding subsections (a) and (b) of this section, a landlord may prevail in an action for summary ejectment if:

- (1) The tenant breached the covenant to pay rent or any other substantial covenant of the lease for which the tenant may be evicted, and such breach is the reason for the eviction; or
- (2) In a case of a tenancy for a definite period of time where the tenant has no option to renew the lease, the tenant holds over after expiration of the term; or
- (3) The violation of G.S. 42-42 complained of was caused primarily by the willful or negligent conduct of the tenant, member of the tenant's household, or their guests or invitees; or
- (4) Compliance with the applicable building or housing code requires demolition or major alteration or remodeling that cannot be accomplished without completely displacing the tenant's household; or
- (5) The landlord seeks to recover possession on the basis of a good faith notice to quit the premises, which notice was delivered prior to the occurrence of any of the activities protected by subsections (a) and (b) of this section; or
- (6) The landlord seeks in good faith to recover possession at the end of the tenant's term for use as the landlord's own abode, to demolish or make major alterations or remodeling of the dwelling unit in a manner that requires the complete displacement of the tenant's household, or to terminate for at least six months the use of the property as a rental dwelling unit.

Remedies, N.C. GEN. STAT. § 42-37.2

(a) If the court finds that an ejectment action is retaliatory, as defined by this Article, it shall deny the request for ejectment; provided, that a dismissal of the request for ejectment shall not prevent the landlord from receiving payments for rent due or any other appropriate judgment.

(b) The rights and remedies created by this Article are supplementary to all existing common law and statutory rights and remedies.

Waiver, N.C. GEN. STAT. § 42-37.3

Any waiver by a tenant or a member of his household of the rights and remedies created by this Article is void as contrary to public policy.

New York

Retaliation by landlord against tenant, N.Y. REAL PROP. ACTS. § 223-b (Consol. 1979)

1. No landlord of premises or units to which this section is applicable shall serve a notice to quit upon any tenant or commence any action to recover real property or summary proceeding to recover possession of real property in retaliation for:

- a. A good faith complaint, by or in behalf of the tenant, to a governmental authority of the landlord's alleged violation of any health or safety law, regulation, code, or ordinance, or any law or regulation which has as its objective the regulation of premises used for dwelling purposes or which pertains to the offense of rent gouging in the third, second or first degree; or
- b. Actions taken in good faith, by or in behalf of the tenant, to secure or enforce any rights under the lease or rental agreement, under section two hundred thirty-five-b of this chapter, or under any other law of the state of New York, or of its governmental subdivisions, or of the United States which has as its objective the regulation of premises used for dwelling purposes or which pertains to the offense of rent gouging in the third, second or first degree; or
- c. The tenant's participation in the activities of a tenant's organization.

2. No landlord or premises or units to which this section is applicable shall substantially alter the terms of the tenancy in retaliation for any actions set forth in paragraphs a, b, and c of subdivision one of this section. Substantial alteration shall include, but is not limited to, the refusal to continue a tenancy of the tenant or, upon expiration of the tenant's lease, to renew the lease or offer a new lease; provided, however, that a landlord shall not be required under this section to offer a new lease or a lease renewal for a term greater than one year and after such extension of a tenancy for one year shall not be required to further extend or continue such tenancy.

3. A landlord shall be subject to a civil action for damages and other appropriate relief, including injunctive and other equitable remedies, as may be determined by a court of competent jurisdiction in any case in which the landlord has violated the provisions of this section.

4. In any action to recover real property or summary proceeding to recover possession of real property, judgment shall be entered for the tenant if the court finds that the landlord is acting in retaliation for any action set forth in paragraphs a, b, and c of subdivision one of this section and further finds that the landlord would not otherwise have commenced such action or proceeding.

Retaliation shall be asserted as an affirmative defense in such action or proceeding. The tenant shall not be relieved of the obligation to pay any rent for which he is otherwise liable.

5. In an action or proceeding instituted against a tenant of premises or a unit to which this section is applicable, a rebuttable presumption that the landlord is acting in retaliation shall be created if the tenant establishes that the landlord served a notice to quit, or instituted an action or proceeding to recover possession, or attempted to substantially alter the terms of the tenancy, within six months after:

- a. A good faith complaint was made, by or in behalf of the tenant, to a governmental authority of the landlord's violation of any health or safety law, regulation, code, or ordinance, or any law or regulation which has as its objective the regulation of premises used for dwelling purposes or which pertains to the offense of rent gouging in the third, second or first degree; or
- b. The tenant in good faith commenced an action or proceeding in a court or administrative body of competent jurisdiction to secure or enforce against the landlord or his agents any rights under the lease or rental agreement, under section two hundred thirty-five-b of this chapter, or under any other law of the state of New York, or of its governmental subdivisions, or of the United States which has as its objective the regulation of premises used for dwelling purposes or which pertains to the offense of rent gouging in the third, second or first degree.
- c. Judgment under subdivision three or four of this section was entered for the tenant in a previous action between the parties; or an inspection was made, an order was entered, or other action was taken as a result of a complaint or act described in paragraph a or b of this subdivision. But the presumption shall not apply in an action or proceeding based on the violation by the tenant of the terms and conditions of the lease or rental agreement, including nonpayment of the agreed-upon rent. The effect of the presumption shall be to require the landlord to provide a credible explanation of a non-retaliatory motive for his acts. Such an explanation shall overcome and remove the presumption unless the tenant disproves it by a preponderance of the evidence.

6. This section shall apply to all rental residential premises except owner-occupied dwellings with less than four units. However, its provisions shall not be given effect in any case in which it is established that the condition from which the complaint or action arose was caused by the tenant, a member of the tenant's household, or a guest of the tenant. Nor shall it apply in a case where a tenancy was terminated pursuant to the terms of a lease as a result of a bona fide transfer of ownership.

Right of tenants to form, join or participate in tenants' groups, N.Y. REAL PROP. ACTS § 230 (McKinney 1995)

Right of tenants to form, join or participate in tenants' groups.

1. No landlord shall interfere with the right of a tenant to form, join or participate in the lawful activities of any group, committee or other organization formed to protect the rights of tenants; nor shall any landlord harass, punish, penalize, diminish, or withhold any right, benefit or privilege of a tenant under his tenancy for exercising such right.

2. Tenants' groups, committees or other tenants' organizations shall have the right to meet without being required to pay a fee in any location on the premises including a community or social room where use is normally subject to a fee which is devoted to the common use of all tenants in a peaceful manner, at reasonable hours and without obstructing access to the premises or facilities. No landlord shall deny such right.

New Zealand

Tribunal may declare retaliatory notice of no effect, RESIDENTIAL TENANCIES ACT 1986 § 54: amended, on 1 October 2010, by section 36 of the Residential Tenancies Amendment Act 2010 (2010 No 95)

(1) Within 14 working days after receipt of a notice terminating the tenancy, being a notice that complies with the requirements of section 51 (or, in the case of a boarding house tenancy, section 66U), the tenant may apply to the Tribunal for an order declaring that the notice is of no effect on the ground that, in giving the notice, the landlord was motivated wholly or partly by the exercise or proposed exercise by the tenant of any right, power, authority, or remedy conferred on the tenant by the tenancy agreement or by this or any other Act or any complaint by the tenant against the landlord relating to the tenancy.

(2) If, on any such application, the Tribunal is satisfied that the landlord was so motivated in giving the notice, it shall declare the notice to be of no effect unless the Tribunal is satisfied that the purported exercise by the tenant of any such right, power, authority, or remedy, or the making by the tenant of any such complaint, was or would be vexatious or frivolous to such an extent that the landlord was justified in giving the notice.



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